

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES A. WOFFORD and STEVE C. JAMES

Appeal No. 95-4450
Application No. 07/949,676¹

ON BRIEF

Before CAROFF, GARRIS and KRATZ, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's refusal to allow claims 23-33, 35 and 36. Claim 34 has been canceled. Claims 1-22, which are the only other claims remaining in the application, have been withdrawn from consideration by the

¹ Application for patent filed September 21, 1992.

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examiner as being directed toward a non-elected invention. The examiner, upon the filing of this appeal, approved entry (advisory mailed June 15, 1994) of an amendment (Paper No. 9) filed after the final rejection.

BACKGROUND

The appellants' invention relates to a method of applying an effective amount of a specified softener composition to a textile material to improve the hand or softness properties thereof and a softened textile material having the specified softener composition distributed thereon. An understanding of the invention can be derived from a reading of exemplary claims 23 and 31, which claims are reproduced below.

23. A method of imparting improved hand or softening properties to a textile material, said method comprising applying to said textile material an effective amount of a softener composition comprised of

(a) at least one fatty acid amide softener agent of a fatty acid having from about 8 to about 22 carbon atoms, and

(b) at least one alkylpolyglycoside

wherein the ratio by weight of the amide softener (a) to the alkylpolyglycoside is about 1.7:1 to about 8:1.

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31. A softened textile material which has distributed therein on a dry fabric substrate weight basis, from about 0.5 to about 20% by weight of a softener composition comprised of

(a) at least one fatty acid amide softener agent of a fatty acid having from about 8 to about 22 carbon atoms, and

(b) at least one alkylpolyglycoside

wherein the ratio by weight of the amide softener (a) to the alkylpolyglycoside is about 1.7:1 to about 8:1.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Cook et al. (Cook)	4,493,773	Jan. 15,
1985		
Llenado	4,565,647	Jan. 21,
1986		

Claims 23, 25, 31 and 32 stand rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103 as being unpatentable over Llenado. Claims 24, 26-30, 32, 35 and 36 are rejected under 35 U.S.C. § 103 as being unpatentable over Llenado. Claims 23-33, 35 and 36 are rejected under 35 U.S.C. § 103 as being unpatentable over Cook in view of Llenado.²

² A separate rejection of the appealed claims under 35
(continued...)

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We make reference to the examiner's answer for the examiner's reasoning in support of the rejections, and to the appellants' brief and reply brief for the appellants' arguments thereagainst.

²(...continued)
U.S.C. § 103 relying on another reference in addition to Cook and Llenado was dropped by the examiner (answer, page 7).

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references and to the respective positions articulated by the appellants and the examiner. We find ourselves in agreement with appellants that the aforementioned rejections are not well founded.

We note that claims 23 and 31, reproduced above, are the only independent claims on appeal herein. Claim 23 is drawn to a method of improving the hand or softening properties of textile material. The method includes the step of applying to the textile material an effective amount of a softener composition made of (a) at least one fatty acid amide softening agent based on C₈₋₂₂ fatty acids and (b) at least one alkyl polyglycoside; wherein the weight ratio of (a) to (b) is 1.7:1 to 8:1 to obtain the improved properties. The specification teaches, in effect, that applying the fabric softener such that the textile fabric contains 0.5 to 20 dry fabric weight percent of the softening composition distributed thereon represents an effective amount to obtain a soft textile fabric product. Claim 31 is drawn to the softened

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textile material product having the above-noted amount of softener composition distributed thereon.

Rejection under 35 U.S.C. § 102 over Llenado

Llenado generally discloses foaming compositions containing an alkylpolysaccharide surfactant together with sulfate, sulphonate and/or carboxylate co-surfactant(s) that allegedly provide controllable aqueous foams (abstract, column 1, line 35 to column 2, line 19). Llenado suggests that these foams are useful in making a variety of products including soap bars, bubble baths, shaving creams, laundry detergent compositions, shampoos, liquid dishwashing detergents, fire extinguishing compositions, resin foams, plastic and gypsum board (columns 1, 8 and 9).

In applying Llenado as an anticipatory reference to claims 23, 25, 31 and 33 on appeal herein, the examiner relies, in part, on Example 20, formula D of Llenado for an alleged anticipating disclosure of appellants' claimed invention including the ratio of fatty acid amide to alkylpolyglycoside recited. We cannot agree with the examiner's analysis.

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In order for a claimed invention to be anticipated under 35 U.S.C. § 102(b), all of the elements of the claim must be found in one reference. See Scripps Clinic & Research Found. v. Genentech Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). The examiner has the initial burden of establishing a prima facie case of anticipation by pointing out where all of the claim limitations appear in a single reference. See In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990); In re King, 801 F.2d 1324, 1327, 231 USPQ 136, 138-39 (Fed. Cir. 1986).

Appellants' claim 23 describes a process for imparting softening properties to textile material by a specific application of an effective amount of a softener composition thereto. The examiner has not pointed to any teaching in Llenado of using formula D of example XX as a softening composition to be applied in an effective amount to textiles to improve the softness thereof as recited in claim 23. We are mindful that Llenado (column 8, lines 1-6) discloses a laundry utility, among other utilities, for the generally described foams as indicated by the examiner. However, patentee does not teach applying an effective amount of a

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composition with the component ratios as claimed for softening textile materials. Moreover, the laundry use of any composition within the broad generic formulas disclosed by Llenado would appear to be followed by a rinse (column 8, line 5) resulting in an apparently small residue to be left on the material that would be laundered. Llenado touts the "quick rinsability" (column 8, line 5) of his foam compositions; thus, cutting against the examiner's position regarding the amount of the composition (add on weight) left on the textile material. Moreover, the formulas of Example XX are disclosed as being useful as liquid dishwashing detergents, not textile softeners as evidenced by the Suds During Washing (SDW) values reported (Compare column 10, lines 6-17). The examiner has not furnished any reasonable basis for concluding that Llenado anticipates the softened textile material of claim 31.

Washing dishes with formula D of example 20 does not result in a softened textile material. Thus, we agree with appellants (brief, page 6) that Llenado does not describe the presently claimed invention. In short, the record before us does not support a conclusion that the examiner has met the burden of presenting a prima facie case of anticipation. It follows

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that we cannot sustain the examiner's § 102 rejection of claims 23, 31, and dependent claims 25 and 33 as being anticipated by Llenado.

Rejections under 35 U.S.C. § 103 over Llenado

We, likewise, cannot sustain the examiner's alternative rejection of claims 23, 25, 31 and 33 and separately stated rejection of claims 24, 26-30, 32, 35 and 36 each under 35 U.S.C. § 103 as unpatentable over Llenado.

In each of these rejections, the examiner additionally relies on Example XXII of Llenado and manipulations of selected portions of the general disclosure of the patent in attempting to show that the claimed process and product textile material would have been obvious to one of ordinary skill in the art. However, we agree with appellants (brief, page 7) that the motivation relied upon by the examiner in selectively using bits and pieces of the Llenado patent disclosure in an attempt to arrive at appellants' claimed invention appears to have come from the disclosure of appellants' method in his specification rather than from the prior art. In this regard, we do not subscribe to the examiner's interpretation of Example XXII of Llenado as

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suggesting a foaming composition containing "8% coconut monoethanol amide and 2% C₁₂₋₁₃ alkyl polyglycoside..." (Answer, page 9) that would be useful as a softening composition for textile material. In our opinion, a skilled artisan would not find a suggestion in Llenado of using the highest disclosed weight percent of amide with the lowest disclosed weight percent of polyglucoside in the disclosed Example XXII foaming composition component ranges of Llenado. Thus, we cannot locate a teaching of the examiner's alleged 4:1 component ratio (answer, page 9) in Llenado. In our view, Llenado would not have rendered the specifically claimed process herein prima facie obvious without the impermissible use of hindsight reasoning. See W.L. Gore & Associates v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983); In re Rothermel, 276 F.2d 393, 396, 125 USPQ 328, 331 (CCPA 1960). Accordingly, we cannot sustain these rejections.

Rejection under 35 U.S.C. § 103 over Cook in view of Llenado

Next, we turn to the rejection of claims 23-33, 35 and 36 under 35 U.S.C. § 103 as unpatentable over Cook in view of Llenado. Cook discloses the use of a laundry detergent that

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contains alkyl polysaccharide surfactant together with other ingredients (column 2, lines 9-25) and in one embodiment a fatty amide (column 7, lines 22-40) as a suds modifier. However, Cook does not teach the application of an effective amount of appellants' specific softener composition with the claimed component ratio to textile material. We cannot agree with the examiner that selecting Cook's highest disclosed amounts of amide for use in a composition with patentee's lowest disclosed amounts of alkyl polyglycosides for forming a softening composition for use in treating textiles as claimed herein would have been obvious since the examiner has not pointed to any particular teachings of Cook or Llenado that would clearly support such a modification. Moreover, for the combined reasons indicated above, we do not find a teaching of appellants' method of using the claimed softening composition or the softened product in the combination of the Llenado patent and Cook as proposed by the examiner. Accordingly, we agree with appellants (brief, page 8) that the proposed combination of Cook and Llenado based on the examiner's picking and choosing of selected fragments of each of the references disclosures in an attempt to arrive at the claimed

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invention herein appears to be based on impermissible hindsight reasoning.

For the above reasons, we find that the examiner has not set forth a factual basis which is sufficient to support a conclusion of obviousness of appellants' claimed invention.

CONCLUSION

To summarize, the decision of the examiner to reject claims 23, 25, 31 and 33 under 35 U.S.C. § 102 as anticipated by or, in the alternative under 35 U.S.C. § 103 as unpatentable over Llenado; reject claims 24, 26-30, 32, 35 and 36 under 35 U.S.C.

§ 103 as unpatentable over Llenado; and reject claims 23-33, 35 and 36 under 35 U.S.C. § 103 as unpatentable over Cook in view of Llenado are reversed.

The decision of the examiner is reversed.

REVERSED

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MARC L. CAROFF)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
BRADLEY R. GARRIS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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